Labor and Employment Alert: Indiana Supreme Court Reiterates Blue Pencil Test for Noncompete Agreements

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Natalie M. McLaughlin

Michael C. Griffaton

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Indiana courts enforce restrictive covenants in employment agreements only if they are reasonable. If a court deems a noncompetition or nonsolicitation provision unreasonable, it will apply the "blue pencil doctrine," severing unreasonable, divisible portions and then enforcing the reasonable parts that remain. Recently, in *Heraeus Medical Inc. v. Zimmer, Inc.,* the Indiana Supreme Court reaffirmed that the blue pencil is "really an eraser" and that courts cannot revise overbroad restrictive covenants by adding terms – "even if the agreement contains a clause authorizing a court to do so."

In *Heraeus Medical*, an employee of Zimmer Inc. signed a noncompetition agreement that also included a provision that precluded him, should he leave Zimmer, from soliciting "any" Zimmer employees to work for a competitor. The employee eventually left Zimmer, joined competitor Heraeus Medical, and then recruited Zimmer's employees "on a weekly basis" to join him. Litigation ensued.

Zimmer alleged that the nonsolicitation provision was violated by the recruiting of its employees to work for Heraeus Medical. The court of appeals concluded that the nonsolicitation provision was unreasonably broad because it extended to "any" individual employed by Zimmer — not just to those who have access to or possess any knowledge that would give a competitor an unfair advantage. Thus, the court held the provision was unenforceable as written. However, the employee's agreement also included a reformation clause that authorized the court to modify otherwise unenforceable provisions. Based on this reformation clause, the court revised the nonsolicitation provision to make it reasonable by adding language limiting its scope to only those employees in which Zimmer had a legitimate protectable interest. Zimmer appealed to the Indiana Supreme Court, which reversed.

The Supreme Court explained that the blue pencil doctrine allows a court "to excise unreasonable, divisible language from a restrictive covenant—by erasing those terms— until only reasonable portions remain." This doctrine "allows an employer to draft a reasonable and enforceable noncompetition agreement, while discouraging the

employer from overreaching." Further, it protects parties' expectations by not subjecting them to an agreement they didn't make. "Importantly, the blue pencil doctrine applies to all restrictive covenants within noncompetition agreements, not just prohibitions against working for a competitor." Thus, the blue pencil doctrine applies to overbroad nonsolicitation covenants, like the one at issue.

Given this history and purpose of Indiana's blue pencil doctrine, the Supreme Court reiterated that "courts cannot add terms to an unenforceable restrictive covenant in a noncompetition agreement—even when that agreement contains language purporting to give a court the power to do so." Consequently, a court may not rewrite a restrictive covenant by adding, changing, or rearranging terms. The Supreme Court rejected that notion that parties could add "a magic phrase" to an agreement that would permit the court to reform an overbroad restrictive covenant. The parties may not "delegate to the courts the task of drafting reasonable agreements."

Turning to the restrictive covenant at issue, the Supreme Court found that the covenant not to solicit "any individual employed" by Zimmer cannot be blue-penciled because there is no language that could be excised to render its scope reasonable. Given this, the Court held that the overbroad provision cannot be reformed and thus the agreement was unenforceable.

Employers in Indiana (as well as in other states that permit restrictive covenants) should ensure that their noncompetition or nonsolicitation provisions are narrowly tailored to protect legitimate business interests. Contact your Vorys lawyer if you have questions about drafting, defending, or enforcing restrictive covenants in employment agreements.